

Unfair Dismissal: Employer's failure to follow its own informal disciplinary procedure resulted in constructive dismissal

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An employee of an NHS Trust who resigned in response to the issuing of an informal “Improvement Notice” in a manner which was inconsistent with her employer’s policy was constructively dismissed.

The facts

Mrs Starling worked for Epson & St Helier University Hospitals NHS Trust as a fertility nurse specialist in the Assisted Conception Unit (ACU). She was employed by the Trust for 40 years at the time of her constructive dismissal and had a clean disciplinary record.

Mrs Starling was aware that incubators needed to be put on to charge ready for a procedure the next day. However, one afternoon she developed a sudden headache and her vision become distorted. One of the Consultants in the ACU advised her to go immediately to A & E, believing that she might be having a stroke or have meningitis. She went to A & E, forgetting to switch on and charge the incubators. When she realised this the next morning, she called the lead Consultant, Dr Croucher, to tell her. However, this was too late for the incubators to be charged. The possible ramifications of this were serious, and could have put a patient’s entire IVF cycle at risk.

Dr Croucher considered that an “Improvement Notice” should be issued to Mrs Starling. She drafted the document and told the matron, Matron Barron, to serve it on Mrs Starling. This notice stated that it was being issued “to ensure that in the future you take the appropriate steps regarding the charging of the incubators in order to prevent any further incidents. Should there be any further issues of this nature; formal action may be taken under the Trusts Disciplinary Policy [sic]. The purpose of raising this with you informally and issuing this informal notice is to ensure that you have been provided with the opportunity to improve, and therefore I hope that any future formal disciplinary action will not be necessary.” When Matron Barron issued the letter she spoke briefly with Mrs Starling and handed the pre-prepared letter to her. No meeting was held with Mrs Starling before the Improvement Notice was issued, so Mrs Starling did not have the chance to give her version of events. Mrs Starling was later diagnosed with a brain tumour.

Soon afterwards, Mrs Starling gave notice of her resignation. She gave two reasons for this: the service of the improvement notice and possible alterations to her working hours.

Mrs Starling’s notice period was extended, by agreement, because of her period of illness. When she had recovered, she asked for her resignation to be retracted. The Trust did not agree to this and her contract came to an end.

Mrs Starling claimed that the issuing of the Improvement Notice and the alteration in her working hours were both breaches of the implied term of trust and confidence and that she had been constructively dismissed.

The employment tribunal found that the alteration in her working hours was not a breach of trust and confidence. However, scrutinising the Trust’s disciplinary policy, the tribunal considered that the policy clearly anticipated that there would be an informal meeting with an employee before deciding to issue an Improvement Notice. There had been no such meeting. There was a clear link in the policy between an Improvement Notice and more formal disciplinary action. The employment tribunal concluded that the issuing of the Improvement Notice without a meeting first had been a breach of trust and confidence and that Mrs Starling had resigned in response to this breach. It did not consider that the fact that she later sought to return to work in the unit affected this. It held that Mrs Starling had been constructively dismissed.

The Trust appealed to the EAT. It argued that the employment tribunal had erred in its interpretation of the effect of the disciplinary procedure and that it had treated the Improvement Notice as a disciplinary sanction, when it was an informal step and part of an informal process. According to the Trust, it was an error of law to find that the implied term of trust and confidence operated so as to require the same procedural steps to be taken in respect of an informal non-disciplinary measure as would be required for a formal sanction.

The Trust also argued that the tribunal had erred in law by failing to find that Mrs Starling had affirmed the contract by her conduct after the resignation.

The EAT dismissed all grounds of the appeal.

What does this mean for employers?

This is a clear reminder to employers that to prevent creating unnecessary constructive unfair dismissal risks, they must follow their policies, including the procedural steps set out in respect of informal measures. This is the case, even where employers are not considering dismissal, as an employer's actions are also moderated by the mutual implied duty of trust and confidence which might be breached where policies are not followed.

[Epsom & St Helier University Hospitals NHS Trust v Starling](#)

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